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IN THE

Supreme Court of the United States

No. [redacted] 95

[redacted] 1958

HERMAN A. DE POVA,

Plaintiff-Respondent,

vs.

CAMDEN FORGE COMPANY,

Defendant-Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SCHAPIRA AND FARKAS,
Attorneys for Petitioner,
17 Academy Street,
Newark 2, New Jersey.

JOHN F. CRANE,
Counsel for Petitioner,
17 Academy Street,
Newark 2, New Jersey.

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on April 2, 1958.

Opinions Below

The opinion of the District Court is unreported and is printed in Appendix B hereto, *infra*, p. 14. The opinion of the Court of Appeals, printed in Appendix C hereto, *infra*, p. 20, is likewise unreported.

Jurisdiction

The judgment of the Court of Appeals was entered on April 2, 1958, p. 29, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Questions Presented

1. Whether the Court of Appeals erred in interpreting sections 14:9-1 *et seq.* of the New Jersey Revised Statutes as permitting a corporation to enter into an employee profit sharing contract without approval of the directors and shareholders, even though the statute specifically provides for approval by the directors and shareholders.

2. Whether, in view of the importance of the question of New Jersey law as to which there was no directly controlling precedent, the District Court should not have declined jurisdiction.

Statute Involved

The statutory provisions involved are Sections 14:9-1, 14:9-2 and 14:9-3 of the Revised Statutes of New Jersey. They are printed in Appendix A, *infra*, at pp. 9 to 13.

Statement

On the basis of diversity of citizenship the plaintiff brought a civil action in the United States District Court for the District of New Jersey to recover for an alleged breach of an employment contract with the defendant, a New Jersey Corporation (R. 3a). The plaintiff asserted that his oral contract included a provision that he was to be paid, in addition to salary, 10% of the net operating profits for the year 1955 together with an option for the purchase of stock (R. 4a, 25a). No action was taken by the Board of Directors as contemplated by the New Jersey Statutes nor was the matter ever submitted to the stockholders (R. 42a).

At the close of plaintiff's case the trial court granted defendant's motion to dismiss. The Court held, under the law of New Jersey, that the purported contract was of such an unusual nature, involving participation in corporate

profits by an employee, that it would require express approval (R. 66a to 71a).

On appeal the Court of Appeals for the Third Circuit reversed holding that the New Jersey Statute, R.S. 14:9-1 *et seq.*, was permissive in nature, that approval of the Board of Directors and stockholders was not a necessary prerequisite to the entry into an agreement to pay an employee part of the corporation's profits, and that the purported agreement was authorized by the general authority contained in the by-laws to appoint agents and employees (R. 7a, 8a).

Reasons for Granting the Writ

I.

The decision is in conflict with that of the Court of Appeals of another circuit concerning the very same statute.

In *Penn* v. *Robertson*, 115 F. 2d 167 (4 Cir. 1940) the Circuit Court of Appeals for the Fourth Circuit was required to pass upon the validity of an executive compensation plan of a New Jersey corporation, The American Tobacco Company. The plan included a contingent interest in the net profits of the business and an employee's stock benefit fund. The Court said, at 115 F. 2d 169:

> "This fund had been originally created and continued by the directors with amendments apparently without authority from the stockholders, although by Chapter 175 of the New Jersey Laws of 1920, N.J.S.A. 14:9-1 et seq., it was provided that a plan for the participation of employes in the purchase of stock or in the profits of the corporation must be first formulated by the directors and approved by two-thirds of each class of stockholders represented and voting thereon."

The Court further said, at 115 F. 2d 173:

> "In the absence of any controlling New Jersey decision, it is our opinion that the transaction (the stock participation plan) was *ultra vires* of the directors and therefore *void* in the sense that it had no legal force and effect, and was incapable of enforcement *without the approval of the stockholders*, which was never contemplated or given; rather than merely voidable." (Emphasis supplied throughout)

II.

The District Court should have declined jurisdiction on the ground of *forum non conveniens* since the case involved an important question of local law as to which there was no directly controlling precedent.

The case of *Rogers* v. *Guaranty Trust Co. of New York*, 60 F. 2d 106 (Dist. Ct. S. D. N. Y. 1932) was another of the series of cases dealing with the executive compensation plan of the American Tobacco Company. In that suit the plaintiff sought to restrain the issuance of stock to directors as compensation. The court dismissed the action declining jurisdiction on the ground that the New Jersey courts were the more appropriate forum. The court said, at 60 F. 2d 108:

> "There seem to be no decisions of the New Jersey courts to serve as a guide in the proper construction and possible interrelation of these statutes. The legality of the corporate proceedings which resulted in the issuance of this stock is *peculiarly a matter for determination in the first instance by New Jersey courts.*"

The Circuit Court of Appeals did not agree as to the application of the doctrine of *forum non conveniens* but affirmed on the merits, 60 F. 2d 114. The United States

Supreme Court however, in *Rogers* v. *Guaranty Trust Co.*, 288 U. S. 123, 53 S. Ct. 295, 77 L. Ed. 652, 89 A. L. R. 720 (1933) affirmed the position of the District Court in declining jurisdiction. The very same New Jersey statute as that in issue in this case was under discussion. Since the New Jersey courts had not passed upon the construction of the statute and grave doubts existed, the Supreme Court held that the District Court correctly declined to entertain jurisdiction leaving the controversy to be decided by the courts of New Jersey. The remarks of Justice BUTLER, writing for the majority, are particularly appropriate to this case. He said, at 288 U. S. 131:

> "But it safely may be said that jurisdiction will be declined whenever considerations of convenience, efficiency and justice point to the courts of the State of the domicile as appropriate tribunals for the determination of the particular case."

Mr. Justice STONE in a dissenting opinion disagreed that the federal courts should decline jurisdiction and proceeded to discuss the case on the merits. In his view the New Jersey Statute "requires the directors first to formulate a plan for stock allotment and declare it advisable, and then to submit it to the stockholders for their approval" 288 U. S. 140. Mr. Justice BRANDEIS concurred while Mr. Justice CARDOZO was of the view that the case should be remanded for a determination on the merits.

Thus at least two justices of the United States Supreme Court have expressed a view of the statute involved diametrically opposed to that taken by the Court of Appeals in the instant case. Six members of the Court were of the opinion that the matter should have been litigated in the state courts since there was no controlling precedent. Application of either view requires a reversal of the judgment of the Court of Appeals.

III.

The Court of Appeals has decided an important question of state law in a way probably in conflict with the law of New Jersey.

There appears to be no decision of the Courts of New Jersey, directly bearing upon the interpretation of the statute in question as related to the issues in this case. However, holdings in other cases on closely related issues indicate that the courts of New Jersey would decide the case differently than has the Court of Appeals.

Minshall v. New Jersey Terminal R. R. Co., 76 N. J. L. 684, 71 A. 663 (Ct. Err. & App. N. J. 1908), was decided by the then highest Court of the state before the enactment of the statute in question. It held that a corporation was not bound by a promise of its president to pay an employee a percentage of its bonds and a block of its stock.

A contract for life employment which had been promised by a vice-president but not reduced to writing nor acted upon by the Board of Directors was held not enforceable in *Savarese v. Pyrene Manufacturing Co.*, 9 N. J. 595, 89 A. 2d 237 (Sup. Ct. N. J. 1952). And it was said generally in *C. B. Snyder Realty Co. v. Nat. Newark, etc., Banking Co.*, 14 N. J. 146, 101 A. 2d 544 (Sup. Ct. N. J. 1953), that authority to enter into contracts of an extraordinary nature cannot arise by implication.

These cases indicate the status of New Jersey law with respect to contracts of an unusual nature. Undoubtedly the Courts would apply the same set of rules to a case such as this providing in quite an unusual fashion for payment to an employee of a high percentage of corporate profits together with stock options.

The case most nearly touching on the subject is that of *Eliasburg v. Standard Oil Co.*, 23 N. J. Super. 431, 92 A.

2d 862 (Super. Ct. N. J. 1952) aff'd *per cur.* 12 N. J. 467, 97 A. 2d 437 (Sup. Ct. N. J. 1953), in which the validity of a stock option plan for executives was considered. In that case compliance with R.S. 14:9-1 *et seq.* seems to have been assumed as a necessary prerequisite. In view of the above cases, the probabilities indicate most strongly that the instant case would have been decided differently in the courts of New Jersey.

IV.

The decision is of imperative importance to the entire financial world as well as to New Jersey corporations, their stockholders and executives.

It is well known that many widely held corporations have been incorporated in New Jersey. Among them are such giants of the American industrial scene as the American Tobacco Company, Standard Oil Company, United States Steel Corporation, Eastman-Kodak, United States Rubber Co. and many others. The protection which the New Jersey Statutes in question afford against diversion of corporate assets cannot be dismissed as merely an optional method of authorizing participation in profits. The long series of cases litigating the incentive plan of the American Tobacco Company and its eventual abandonment on the advice of counsel (See: *Penn* v. *Robertson, supra*, at 115 F. 2d 171) demonstrates quite clearly that the statute can serve to protect shareholder interests only if it is construed as a mandatory enactment setting forth the exclusive manner of authorizing participation in profits.

The vital interests of shareholders, executives and corporations require that an authoritative decision be rendered concerning the New Jersey Statute. This end can be achieved only by granting the writ of certiorari. Presently the decision of the Court of Appeals is the law of the case. This will govern the subsequent trial on remand. How-

ever the state of the law as to other litigants will remain in doubt. The Courts of New Jersey have not spoken definitively and the question will have been resolved differently in two different circuits. Unless this court acts to grant certiorari a matter of vital interest to the financial community, executive managers and stockholders will remain in a continued state of doubt.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

SCHAPIRA AND FARKAS,
Attorneys for Petitioner.

JOHN F. CRANE,
Counsel for Petitioner.

Appendix A

Relevant Statutes

New Jersey Revised Statutes

14:9-1. Employees' stock participation; acquisition of stock; sharing profits; furnishing benefits; electing directors. Any stock corporation formed under any law of this State may, upon such terms and conditions as may be determined in the manner hereinafter designated, provide and carry out a plan or plans for any or all of the following purposes:

a. The issue or the purchase and sale of its capital stock to any or all of its employees and those actively engaged in the conduct of its business or to trustees on their behalf, and the payment for such stock in installments or at one time, with or without the right to vote thereon pending payment therefor in full, and for aiding any such employees and other persons in paying for such stock by contributions, compensation for services, or otherwise.

b. The participation by all or any of its employees and those actively engaged in the conduct of its business in the profits of the corporate enterprise or of any branch or division thereof. The participation may be based upon length or nature of service, amount of compensation paid or shares owned or upon such other basis as may be selected for the purpose, and may be in cash or by the delivery of shares of its capital stock held by it, or issued or purchased by it for the purpose. Such share in the profits shall be regarded as a part of the corporation's legitimate expenses.

c. The furnishing to its employees wholly or in part at the expense of the corporation of medical services, insurance against accident, sickness or death, pensions during old age, disability or unemployment, education, housing,

social services, recreation or other similar aids for their relief or general welfare.

d. The nomination and election by its employees of one or more thereof as a member or members of its board of directors, such member or members to have the same rights and authority and be subject to the same duties and responsibilities as the directors to be elected by the stockholders. Every such corporation may determine and provide the manner of making any such nominations and calling and conducting any such election, the time and place where it shall be held, what number of years of service or other qualifications shall entitle its employees to one or more votes, whether said votes shall be cast personally or by proxy, what number of votes shall be required to elect, and such other restrictions and conditions as may be deemed proper. The voting at all such election shall be by secret ballot, and if less than a majority of employees entitled to vote participate in the election, the election shall be inoperative and void. Any vacancy occurring in any such office, by reason of a failure to elect or otherwise, shall be filled in the manner provided for in the plan, and in the absence of such provisions such vacancy shall be filled from among the employees or stockholders by the board of directors.

14:9-2. Exercise of privileges and powers; provision in charter; formulation of plans and submission to stockholders. Any of such privileges and powers may be exercised by including appropriate clauses therefor in the original articles of incorporation or in the by-laws at the time of organizing the corporation; or, where the corporation has been formed without such charter or by-law provisions, the board of directors shall first formulate such

plan and pass a resolution declaring that in its opinion the adoption thereof is advisable, and calling a meeting of the stockholders to take action thereon. The stockholders' meeting shall be held upon such notice as the by-laws provide, and in the absence of such provision upon ten days' notice given personally or by mail. If two-thirds in interest of each class of stockholders present at the meeting and voting shall vote in favor of any such plan or any modification thereof, it shall thereupon become operative.

14:9-3. Dissenting stockholder; appraisal of stock; transfer of stock. In case any corporation shall adopt a plan providing for the issue of new stock under paragraphs "a" and "b" of section 14:9-1 of this Title, or any plan provided for in paragraph "d" of said section 14:9-1, any stockholder holding stock issued by such corporation before April fifteenth, one thousand nine hundred and twenty, not voting in favor of the plan, who, at any time prior to the vote at the meeting of stockholders on the adoption of said plan, shall give to the corporation of which he is a stockholder written notice of his dissent, may, within thirty days after such stockholders' meeting, apply to the Superior Court on reasonable notice, to be prescribed by such court, to such corporation for the appointment of three disinterested appraisers to appraise the market value of the stock held by such stockholder and issued prior to April fifteenth, one thousand nine hundred and twenty, without regard to any depreciation or appreciation thereof in consequence of the adoption of the plan, whose award, or that of a majority of them, when confirmed by such court, shall be final and conclusive on all parties.

The corporation shall pay to such stockholder the value of such stock as aforesaid. On receiving such payment, or on a tender thereof, or in case of any legal disability or

absence from the State, on the payment of the award into such court, the stock shall be transferred to the corporation, to be disposed of by the directors or to be retained for the benefit of the remaining stockholders.

In case the award is not paid within thirty days from its filing and confirmation by the court and notice thereof given to the corporation, in the manner aforesaid, the amount of the award shall be a judgment against the corporation, and may be collected as other judgments in such court are collected. The court may fill any vacancy in the board of appraisers occurring by refusal or neglect to serve or otherwise.

The charges and expenses of the appraisers and appraisal as approved by the court shall be paid by the corporation.

The corporation may, at any time before the proceedings hereinbefore mentioned are instituted or completed, elect to permit the dissenting stockholder to subscribe for his proportionate share of such new stock issued under paragraphs "a" and "b" of section 11:9-1 of this Title, in which event such proceedings shall not be instituted, or, if instituted, shall be terminated upon the payment of the appraisal expenses as aforesaid by the corporation.

11:9-4. Recalling, cancelling or revising plans; alteration or repeal by stockholders. Any plan so adopted may be recalled or abolished in the same manner as is herein provided for its adoption, subject, however, to the restoration from any trust fund created by such corporation for carrying out or effectuating any such plan, or by the corporation if no such trust fund has been created, of any moneys contributed by employees or those actively engaged in the conduct of the corporate business, and for which no stock or other equivalent has been issued.

Appendix A

Any plan heretofore adopted or which may hereafter be adopted by any corporation of this State may be amended or revised by the board of directors of the corporation by resolution of said board; provided, however, that no such amendment shall be effective which shall attempt to, (1) deprive any employee of any shares of the capital stock of the corporation which he may have acquired through or as a result of said pension plan; (2) deprive any employee of his right to participate in the profits of the corporate enterprise or any branch or division thereof; or (3) divert any part of the fund whether corpus or income which may have been set up by the corporation to provide for the payment to or for the benefit of the employees of the corporation, or of any corporation a subsidiary thereof or affiliated therewith, of pensions during old age, disability or unemployment or for the relief or general welfare of any or all of such employees.

Any amendment to or revision of the plan so made by the directors of the corporation may be altered, changed or repealed by the stockholders.

14:9-5. Powers of article additional. The privileges and powers conferred by this article shall be in addition to and independent of all powers and authority conferred by any other law, and not in restriction or limitation of any of the powers of corporations of this State.

A resolution or by-law adopted or approved prior to June thirteenth, one thousand nine hundred and thirty two, by a majority vote of the stockholders of a corporation entitled to vote thereon shall be valid from the time of such adoption or approval to the extent that it contains terms which might be embodied in a plan or plans authorized by this article.

Appendix B

Oral Opinion of United States District Court

RULINGS ON MOTION BY DEFENDANT FOR DISMISSAL OF COMPLAINT.

THE COURT: We have here a case wherein the plaintiff sues for alleged breach of contract, the breach of contract being that in the spring of 1955, while in the employ of the defendant company, he entered into a new contract with the defendant company raising his salary from the rate of $20,000.00 a year to the rate of $35,000.00 a year for the balance of the term of the year; namely, from March 1st to December 31st, and in addition, and as an integral part thereof, he was to receive 10% of the operating profits of the company for the entire year of 1955.

This is a motion to dismiss at the close of the plaintiff's case, and on motions of this nature, it is incumbent upon the court to view all the testimony in the light most favorable to the plaintiff to show whether or not the plaintiff has, as a matter of law, carried the burden that is his to establish a cause of action by a preponderance of the evidence sufficient to go to the jury. The facts disclose that in early January, 1954, the plaintiff became associated with the defendant company through a conversation and agreement with Mr. Burrill. He then worked for the company at the rate of $20,000.00 a year without any written agreement. This indicated, at the very least, implied authority in the chairman of the executive committee, to engage an individual to work for the company. That would have to be, however, within certain reasonable terms. Thereafter, while continuing his work for the defendant company, the plaintiff attended, at least, one board meeting of the board of directors, and submitted a business report, and was thereupon

questioned by the officers and directors of the company, and, thereafter, a resolution was adopted continuing the plaintiff in a certain and specified position. So that up to that point, we can say that Burrill, by reason of being the chairman of the executive committee had authority, implied, at least, to hire executives of the capacity of the plaintiff here. So far as credibility is concerned, at this point, naturally, we have to accept the plaintiff's words, but where does it take us? It takes us to the position that he received an offer in the early part of the spring of 1955 from Erie Forge and Steel Company. As a result of that offer, he communicated it to Mr. Dardi, his immediate superior, who, incidentally, was a member of the executive committee, and as a result thereof, Mr. Dardi arranged a conference between the plaintiff, Mr. Dardi, and Mr. Burrill. Such conference was held, to the best of the plaintiff's recollection, in April, 1955, at which time, the plaintiff testified that it was agreed that the plaintiff's salary should be advanced from the rate of $20,000.00 a year to $35,000.00 a year for the balance of the year 1955, that is, from March 1st to December 31st, and that in addition thereto, and as an integral part thereof, the plaintiff was to receive as part of his remuneration under this new contract, 10% of the operating profits of the defendant company for the year 1955. There was, likewise, some mention made of an option to be given to the plaintiff on a block of stock with which the plaintiff wasn't concerned at the time, and didn't feel that it entered into his contract. He makes no application for damages in that respect.

The defendant company, naturally, could not take action by the board of directors every time it hired and fired an employee because it is in the record that there were 300 or more employees. It becomes, therefore, a question of where along the line, this authority to hire and fire stops, and rests

solely in the board of directors. I questioned the plaintiff upon the stand, and asked if the contract entered into on his part which changed the rate of pay to $35,000.00 and 10% of the profits was a divisible one, a separable one. If the plaintiff had answered yes, that it was separable, it would be the court's notion that the case could go to the jury on the contract of employment, but could not go to the jury on the question of the division of profits.

The court has to recognize that here, according to the testimony, at the very least, we can't dispute or it won't enter a dispute as to why, but, at the very least, according to the testimony of the plaintiff, the corporation was in difficulty with its creditors, and for the corporation to be bound by the action of one or two individuals without corporate action or procedure, or without a showing by the plaintiff that the individuals involved had express authority from the board of directors to negotiate any such contract for the corporation to give away 10% of its operating profit is an item of great magnitude, and of such magnitude that the court feels constrained, as a matter of law, to hold that one or two individuals without direct and express authority from the board of directors, cannot do it.

The court has read a considerable number of cases attempting to reach the solution of this matter. I think we will all agree that inasmuch as this matter is before the court solely by reason of diversity of citizenship, the court is sitting as another court in New Jersey, and is bound by the law that the New Jersey courts would apply. This is alleged to be a contract of employment with a New Jersey corporation to be performed in New Jersey, and, consequently, it would be the court's interpretation that under the conflict-of-laws rule that the law of New Jersey would apply to that. Incidentally, the court has read SAVERESE v PYRENE MANUFACTURING COMPANY, 9 N. J. 595; BIRD v.

Appendix B

J. L. Prescott Company, 89 N. J. L. 591; Aerial League of America v. Aircraft Fireproof Corporation, 97 N. J. L. 530, and Eilen v. Tappins Inc., 16 N. J. Super. 53. It seems to the court that the most succinct statement of this matter is in the Savarese case, which is one of the leading cases of this State on that point, and there at page 603 (I think it is Justice Wachenfeld speaking for the Supreme Court of New Jersey—yes, it is), he said:

"There is a further reason why the action cannot be sustained. The affidavits submitted by the plaintiff in opposition to the defendant's motion no where show the authority of Weed to bind the defendant to the promises he is alleged to have made and the defendant vigorously denies any such authority existed.

"An affidavit of the company's assistant secretary supporting the motion avers the corporation at no time by act or resolution of its directors or in its by-laws authorized any officer or other agent of the company to enter into a contract of life employment nor was any such contract ever ratified by the corporate authorities. No attempt has been made by the plaintiff to contradict these assertions.

"A contract of employment for life is of an extraordinary nature, outside the regular custom and usage of business. The authority of a corporate officer to enter into such a contract on behalf of his principal cannot arise merely by implication.

"A corporation is bound by the act of an officer or agent only to the extent that the power to do the act has been conferred upon such officer or agent expressly by the charter, by-laws or corporate action of its stockholders or board of directors, or can be implied from the powers expressly conferred, or which are

incidental thereto, or where the act is within the apparent powers which the corporation has caused those with whom its officers or agents have dealt to believe it has conferred upon them," citing AERIAL LEAGUE OF AMERICA v. AIRCRAFT FIREPROOFING CORPORATION.

"In HEAMAN v. E. N. HOWELL CO., a New York case, found in 261 N. Y. 229, the Court of Appeals said:

"Alleged contracts of life employment are, however, so unusual as to have been, with rare exceptions, condemned by the courts as unreasonable and unauthorized. The president or other executive officer of a corporation has no authority as such to make a contract that one should remain in the corporate employ for life even under a general power to appoint, remove and fix the compensation of employees. That any board of directors or other persons responsible for the management of a corporation should give such "unusual power to an executive officer cannot be implied. Plain language of the managing board, clearly showing that such was the intention of the corporation, coupled with power actually or impliedly vested in the corporation itself, must be found to justify such a hiring.

"The record before us is devoid of any showing of authority upon the part of Weed to bind the defendant to the agreement he is alleged to have made. On this additional ground we likewise conclude the plaintiff has not borne the burden of proof of establishing an enforceable contract."

While, if the court is to indulge in sympathy, my sympathies might all be with the plaintiff dealing, I guess, in what he thought was an honest, forthright fashion, and, possibly, not with the defendant for there is, at the very least, an indication here for stock manipulation purposes, of the

milking off of all the assets and the business acumen of an established corporation, nevertheless the court is bound by the law as it finds it, and I can certainly liken under the law of the Saverese case, the giving away of 10% of the net profits of the corporation for a year or half a year's operation, to be greater in contrast, and requiring more stringent action by the corporation through its corporate authority; namely, the board of directors, than the hiring of a laborer for a term of life, for the entire obligation there could not amount to anywheres near as much as the possibility of 10% of the net profits of a corporation of this magnitude would amount to. If we were to interpret that the executive officer of a corporation, under the authority given here, could hire executives at a rate of pay and in addition thereto give them 10% of the operating profits of the corporation, it is easily imaginable how in the space of hiring 12, or 15, or 20 executives of a company, that the president, by his own action under such implied authority, could give away twice as much profit as the corporation would make in the course of a year, and, consequently, bankrupt it. That is certainly not the interpretation that the court places upon the cases and, in particular, the Saverese case. While my sympathies may be with the plaintiff completely under the proofs of the case, the law is contrary to his position. I have no choice other than to grant the motion, and grant you an exception.

The application will be granted. You prepare an order. The action will be dismissed without costs, and with prejudice.

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,332

HERMAN DE POVA

Appellant

v.

CAMDEN FORGE COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

Argued February 6, 1958

Before GOODRICH, MCLAUGHLIN and HASTIE, *Circuit Judges.*

Opinion of the United States Court of Appeals

(Filed—April 2, 1958)

By GOODRICH, *Circuit Judge.*

This is an appeal from a judgment for the defendant entered at the close of the plaintiff's case in a suit for the breach of an employment contract. The case is in federal court by virtue of diversity jurisdiction only and matters of state law are, as a matter of course by now, settled by the approriate state authorities. The defendant is a New Jersey corporation; the case was tried in the District of New Jersey; important operative facts occurred in New

York and Pennsylvania. If there are conflict of laws questions involved, the New Jersey rule governs. *Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U. S. 487 (1941).

Since judgment was rendered against the plaintiff at the end of his case he has, on this appeal, the benefit of all the evidence in his favor and such inferences as may fairly be drawn therefrom. In stating the facts of the case we take his evidence as true, but only, of course, for the purpose of this appeal. To win finally the plaintiff will have to prove his case to the satisfaction of the trier of the fact whether court or jury.

The plaintiff, Herman A. De Pova, was employed by the defendant in 1954 for a year. The arrangement was concluded at a conference in New York between the plaintiff and Lowell Birrell, at that time a director and chairman of the Executive Committee of the defendant company. The plaintiff was to work at $20,000 per year, compensation retroactive to January 1, 1954, until Birrell "was satisfied I was worth more." Plaintiff went to work for the company beginning, as he was directed to do, by making a survey to see why the company was losing instead of making money. He made frequent reports to Birrell and, in August of 1954, summarized his findings before the Board of Directors at the request of Virgil Dardi, the Chairman. The plaintiff was requested at this meeting and was authorized by the Board to assume the duties of Dardi's assistant and general manager. Thereafter, under his supervision the company's position began to improve. The plaintiff was able to report in December of 1954 that the defendant company would be operating profitably at the end of the first quarter of 1955. This proved to be true.

The plaintiff continued his work for the defendant in 1955. In March of that year he was offered an advantageous contract of employment with a concern called Erie

Forge and Steel Company. He discussed this offer with Dardi who said he would propose to Birrell an increase in the plaintiff's salary for the remainder of 1955 to $35,000 per annum plus ten per cent of the net operating profits. Following this conversation, a meeting was held in Birrell's suite in a New York hotel. Birrell approved of the tentative arrangement, expressed pleasure with the plaintiff's conduct of the company affairs and added that the plaintiff should be given some options on stocks in companies that Birrell represented at the time. This last item has no significance in this lawsuit. It is mentioned only as part of the complete approval which plaintiff's work for the defendant met with on the part of the Acting President-Chairman of the Executive Committee of the Board of Directors and the Chairman of the Board of the company.

The plaintiff never got his increased compensation. The plaintiff never got his promised ten per cent of the net operating profits. Birrell resigned as Director and Chairman of the Executive Committee in August, 1955. Plaintiff was discharged by the defendant in the middle of October, 1955, and was not paid any salary for the final two and one-half months of that year. There is no evidence that the Board of Directors passed upon his discharge and no minute of the Board reflecting any action relating to the discharge. The plaintiff was told that the business had been sold to another company.

So much for the facts from the plaintiff's point of view. Now we turn to the legal questions.

I. Was There Any Breach of Contract of Employment?

The defendant's argument hints at a lack of tenure for the plaintiff alleging that he was asked to come in for a survey of defendant's operations, that the contract was

indefinite as to length and, therefore, he was dischargeable at will. But there is direct testimony from the plaintiff that he was originally hired for a year. He says so, in so many words. Furthermore, his compensation was fixed on an annual, not a per diem, basis. See 1 WILLISTON, CONTRACTS §39, at 106-09 (rev. ed. 1936).

We now turn to the year 1955. The plaintiff continued to work for the company and was paid on the same basis as he had been before. Dardi, on December 20, 1954, wrote the plaintiff that he looked "forward to working with you in 1955." We think there is enough here to justify the trier of the fact to come to the conclusion that the plaintiff had an annual contract for the year 1955. See *id.* §90, at 255. In that case he should be entitled to recover the difference between what he was promised and what he got.

This amount should include at least the unpaid portion of his original $20,000 salary. The defendant, however, says that this claim is not open to the plaintiff on the pleadings. We do not find this position to be maintainable and we think that a reading of the complaint will show that.

Does "what he was promised" include the increased compensation which Birrell agreed to give him at that meeting in New York?

Under the above analysis of this case, the only problem involved as to this question is whether consideration could be found for the additional pay to a man on an annual contract who has not reserved his freedom to quit. See *id.* §§130, 130B; 1 CORBIN, CONTRACTS §175 (1950).

So eminent an authority as Corbin, however, would permit recovery to be had in such cases in the absence of countervailing circumstances. *Id.* §186, at 608-11.

The other analysis of the case on the facts would give to the plaintiff for the year 1955 employment terminable at will up to the time when the Erie Forge offer came along.

Then, in view of the plaintiff's giving up the possibility of a profitable employment with Erie Forge he is promised this additional and attractive compensation by Birrell. 1 WILLISTON, *op. cit. supra* §130B; 1 CORBIN, *op. cit. supra* §§135, 175. On this version of the facts the employment at will would be succeeded by an employment for at least the balance of the calendar year 1955 at the new rate of compensation. This, according to plaintiff's testimony, seems to be what the parties had in mind.

We think further that a recovery on the basis of $35,000 per annum from March 1 to December 31, 1955 can be had regardless of the foundation for plaintiff's claim for the ten per cent of the 1955 operating net profits. 2 FLETCHER, PRIVATE CORPORATIONS §467 (rev. vol. 1954). The contract is clearly severable. If a man has a contract to buy a horse and a cow and the cow dies before the date of delivery, could anyone reasonably say that the promisee was still not entitled to the horse? We think the same thing is applicable here. See RESTATEMENT, CONTRACTS §463 (1932); *cf. id.* §606 (illegality).

The authority to make this agreement with the plaintiff creates no serious problem so far as this item of recovery is concerned. It was made for the company through Birrell and Dardi whose powers were very wide as will be explained in greater detail when we reach the next point.

II. MAY THE PLAINTIFF RECOVER ON THE PROMISE TO PAY HIM TEN PER CENT OF THE NET OPERATING PROFITS FOR THE YEAR 1955?

This was the point that bothered the district judge especially when pressed with the New Jersey case of *Saccarese v. Pyrene Mfg. Co.*, 9 N. J. 595, 89 A. 2d 237 (1952). It was a case where an employee alleged that he had been promised a job for life although there was neither board of

directors nor stockholder priority authority or ratification. The court, in passing, mentioned this contract as an extraordinary one outside the regular custom and usage of business for officers to make on their own. We can dispose of that case quite easily by saying that it involved a contract which tied an employee to the corporation for life regardless of his efficiency or his ability to get results. There is good background in legal authority for closely scrutinizing such an arrangement. See, *e.g.*, Annot., 135 A. L. R. 646 (1940); 35 *Am. Jur., Master & Servant*, §24 (1941). See also the discussions of this point in *Sararesa v. Pyrene Mfg. Co., supra* and *Eilen v. Tappin's Inc.*, 16 N. J. Super. 53, 83 A. 2d 817 (App. Div. 1951).

What we are dealing with here, however, is an incentive type of contract which we believe stands on quite a different footing. This claim involves not a burden for the corporation to carry but a sharing of the fruits of profitable corporate activity.

It is noteworthy that the statutes of New Jersey recognize a public policy in favor of such incentive agreements. They also state a method by which those agreements may be provided for in the corporate structure. 14 N.J.S.A. §19-1 to -5 (1937). It is arguable, although we do not believe soundly, that since the statute prescribes formalities for this type of contract, the statutory procedures must be followed in order to have it. We think such an argument pushes the effect of a permissive statute much too far. It does not follow that because this kind of contract can be made by following one course that it cannot be made by following some other course. And there is good authority recognizing the legality of this type of employee arrangement aside from any statutory authority upon it. See, *e.g.*, 5 *Fletcher, Private Corporations*, §2143 (rev. vol. 1952); *Bennett v. Millville Improvement Co.*, 67 N. J. L. 320, 51 Atl. 706 (E. & A. 1902).

Appendix C

To ascertain the legal effect of what was done here, we must examine the corporate structure of the Camden Forge Company.

There is a directors' resolution of December 11, 1953, in evidence. It sets up an Executive Committee of three members. We do not think that this Executive Committee has significance in this case. The conference which the plaintiff tells about which was held in New York with Dardi and Birrell representing Camden Forge in negotiations with the plaintiff was between the plaintiff and two members of the Executive Committee. But there was no called meeting of the Committee and while two members might have done business effectively through a meeting duly had, there is no basis for claiming Executive Committee action by this conference held in the bedroom of a New York hotel.

But at this same meeting of December 11, 1953, it was also resolved that Lowell Birrell be made Chairman of the Executive Committee and it was further

> "RESOLVED that in view of the fact that the office of President is vacant, the Chairman of the Executive Committee shall assume and exercise all the powers of the President as they are specified in Sec. 8 of the by-laws of the corporation * * *."

Reference to Section 8 in the by-laws of the corporation disposes in one sentence of Birrel's then power to hire the plaintiff. The President is given "general supervision of the business affairs and property of the corporation * * *."

Now we turn to Article IV, Section 3 of the by-laws. The relevant language starts in the middle of a sentence:

> "* * * the Board of Directors or the President may from time to time appoint such agents and employees

of the Corporation as may be deemed proper. Such officers, agents and employees shall hold office for such period, have such authority, and perform such duties as in these by-laws provided or as the Board of Directors or the President may from time to time prescribe * * *."[1]

Whatever might be the necessity of a wider base in corporate authority for an officer to negotiate a profit-sharing contract, it seems to us to be clear from the structure and operation of this corporation that the intention was to concentrate a very great amount of authority in the Chairman of the Executive Committee and, interestingly, not in the Chairman of the Board. That being so, we think that Birrell did have from the corporation itself authority to make this incentive contract with the plaintiff. There is testimony which, if accepted, proves that he did so on behalf of the corporation. That is enough to allow the plaintiff to have his case submitted to the trier of the facts.

We, therefore, do not need to face in this case how far corporate officers may go in making incentive contracts without authorization by the directors. For better or for worse, the by-laws of this corporation representing, of

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[1] It should be noticed in passing that the resolution of December 11th gave Birrell as Chairman of the Executive Committee "all the powers of the President as they are specified in Section 8" and what is just quoted from is Section 3 of the same article. We do not believe, however, in view of the quite obvious purpose to throw all possible corporate powers into Birrell as Chairman of the Executive Committee, that the language of the resolution is one of limitation. We think decidedly it is one of grant. Just why there was such effort to concentrate corporate powers in Birrell's hands at this point is not shown in the record and is none of our business in this case.

course, corporate action by those who are responsible for its origin, gave the President equal authority with the Board of Directors as to employment. In other words, the President is authorized to do what the Directors can do and, by resolution, the Chairman of the Executive Committee is authorized to do what the President can do. This may or may not be a wise corporate arrangement but it is the arrangement that was made.

The judgment of the district court will be reversed and the case remanded for further proceedings not inconsistent with this opinion.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,332

HERMAN DEPOVA,

Appellant,

vs.

CAMDEN FORGE COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Present:

GOODRICH, McLAUGHLIN and HASTIE,
Circuit Judges.

Judgment

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, with costs, and the case remanded for further proceedings not inconsistent with the opinion of this Court.

Attest:

IDA O. CRESKOFF
Clerk

April 2, 1958